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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

UNION PACIFIC RAILROAD COMPANY, Plaintiff and Respondent, v. SFPP, L.P. et al., Defendants and Appellants.	B199403 (Los Angeles County Super. Ct. No. BC236852)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Mayer Brown, Neil M. Soltman, Donald M. Falk, and Michael F. Kerr for Defendants and Appellants.

Manatt, Phelps & Phillips, Craig S. Bloomgarden, Brent G. Cheney, and Benjamin G. Shatz for Plaintiff and Respondent.

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We last considered this contract dispute between a pipeline and a railroad in 2003 when we reversed summary adjudication granted in favor of the Railroad. (*Union Pacific Railroad Co. v. SFPP* (Dec. 22, 2003) B160234 [nonpub. opn.] (*Union Pacific I*).) We concluded that the phrase "[*i*]*n the event the Railroad shall at any time deem it necessary* . . . ." was ambiguous. We held that whether that phrase should be interpreted broadly or narrowly was a question of material fact. (*Union Pacific I*, *supra*, B160234.)

In an extensive trial, each side presented extrinsic evidence, and the Railroad again prevailed. In the current appeal, the Pipeline argues it is entitled to judgment as a matter of law because the undisputed course of performance evidence supports its narrow interpretation of the parties' agreement. We reject the Pipeline's argument that the course of performance evidence ineluctably leads to its contract interpretation. Instead, we conclude the trial court's interpretation is supported by substantial evidence. We also reject the Pipeline's arguments that the text of the agreement confirms its interpretation. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Union Pacific Railroad Company (Union Pacific or the Railroad) filed a complaint on September 14, 2000, against SFPP, Kinder Morgan Operating L.P. "D," and Kinder Morgan G.P, Inc. (collectively the Pipeline). Among other causes of action, the Railroad sought declaratory relief based on a contract. The Railroad alleged, "An actual controversy has arisen and now exists between Union Pacific and Defendants concerning their respective rights and duties in that Union Pacific contends that, when it is deemed necessary to relocate SFPP's pipeline, Defendants must pay for the relocation, pursuant to the Amended and Restated Easement Agreement [AREA] . . . . [¶] . . . Union Pacific desires a judicial determination of its rights and duties, and a declaration as to the duties of the parties under the [AREA] as it relates to the cost of relocating [the] pipeline."

The following provisions of the AREA are pertinent to this appeal:

"1. (a) Railroad hereby grants to Company [Pipeline] (subject to the reservations, covenants and conditions hereinafter set forth) the perpetual non-exclusive easement and right to construct, reconstruct, renew, maintain and operate a pipe line and appurtenances for the conveyance of petroleum or natural gas, or products derived from either or both thereof. . . ." [¶] . . . [¶]

"(f.) This grant is subject to and subordinate to the prior and continuing right and obligation of Railroad and its respective successors or assigns to use and maintain the entire railroad right of way and property in performance of its public duty as a common carrier and is also subject to the right and power of Railroad, its successors or assigns in interest or ownership of the said railroad right of way and property, to construct, maintain, use and operate on the present or other grade, existing or additional railroad tracks and appurtenances thereto, including water and fuel pipe lines and conduits and telegraph, telephone, signal, power and other electric lines and other railroad facilities and structures of any kind upon, along or across any or all parts of said land above described, all or any of which may be freely done at all time or times by Railroad, or its successors or assigns, without liability for compensation or damage." [¶] . . . [¶]

"3. The Company, its agents, employees and contractors, shall have the privilege of entry upon the property of Railroad for the purpose of constructing, reconstructing, renewing, maintaining and inspecting said pipe line. The location, plans and specifications for said pipe line upon Railroad's right of way and property shall be subject to the approval of Railroad. The Company agrees that said pipe line shall be constructed, reconstructed, renewed, maintained and operated and all work thereon or in connection therewith shall be performed in a careful, safe and workmanlike manner in accordance with all laws and regulations governing the same and in such manner as not to interfere with or endanger railroad property or operations. *In the event that Railroad shall at any time deem it necessary, the Company shall, upon receipt of written notice so to do, at Company's sole cost and expense, change the location of said pipe line, its adjuncts or appurtenances, on railroad property to such point or points thereon as Railroad shall designate and reconstruct or reinforce the same*." (Italics added.)

We refer to the italicized language as the Relocation Provision.

1. *Prior Appeal*

We previously reversed a summary adjudication in favor of the Railroad. We concluded that the term "necessary" in the Relocation Provision was ambiguous. (*Union Pacific I, supra*, B160234.) Following *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 38 (*Pacific Gas*), we held that the interpretation of the Relocation Provision was a question of material fact. We explained that the parties' course of conduct under the 1955 and 1956 agreements is relevant extrinsic evidence. (*Union Pacific I, supra*, B160234.) We also stated that the Railroad's rejection of a proposed modification by the Pipeline may be relevant evidence in considering the parties' intention. (*Ibid.*)

2. *Trial*

Following our decision, an extensive court trial ensued. The parties presented numerous witnesses and hundreds of exhibits. The parties agree that they entered into agreements in 1955 and 1956 when they were related companies. The trial court found, and the finding is supported, that at that time, the Railroad was the Pipeline's parent (a finding we will discuss in more detail). In 1983, the Railroad's stock was placed in a voting trust while the Interstate Commerce Commission (ICC) considered the Railroad's merger with another railroad. In 1988, Rio Grande Industries purchased the Railroad. In 1994, the parties entered into the AREA as a settlement agreement. The content of the provisions in the AREA are the same as those included in the parties' earlier 1955 and 1956 agreements. In the course of the trial proceedings, the parties agreed that the court should interpret the 1955 and 1956 agreements.

At trial, the Pipeline relied almost exclusively on the course of performance evidence. It argued the course of performance evidence overwhelmingly supports its interpretation and is further supported by admissions from Railroad employees. The Pipeline asked the court to give the course of performance evidence primacy.

The Pipeline characterized the course of performance evidence as follows: (1) the Pipeline paid for any relocation that was for a "railroad purpose;" and (2) where a third party required the Pipeline to move, the Railroad told the third party to deal with the

Pipeline, and the Pipeline would agree to move only if it was reimbursed. In its opening brief, the Pipeline states: "Of the 45 third-party relocations from 1955 to 2000, the third parties paid for either 40 or 41. The Railroad paid for the remaining four." (Fn. omitted.) For purposes of this appeal only, we accept as "facts" all of the Pipeline's characterizations of the course of performance evidence, even though some of them are disputed.

The Railroad argued that not all extrinsic evidence was probative and sought to minimize the course of performance evidence. Whereas the Pipeline emphasized that it paid for relocations, the Railroad emphasized, that it never paid for them when the parties were affiliated. The Railroad argued that it created the Pipeline as a wholly owned subsidiary, and the Pipeline was "secondary" to the Railroad. The Railroad underscored the Pipeline's proposed modification to the Relocation Provision, which provided: "In the event that the pipelines interfere with the safe operation of Railroad's operating facilities, the Company shall, upon receipt of written notice so to do, at Railroad's sole cost and expense, change the location of said pipelines to another location on railroad property . . . ." The Railroad rejected the proposed modification and, as mentioned, the AREA contained the same Relocation Provision as the earlier agreements.

The Railroad also relied heavily on a draft memorandum by a Pipeline employee providing: "Due to the I.C.C.'s denial of the merger of the two railroads, and the possible divestiture of [the Railroad] by the parent company, [the Pipeline] feels the need to record a Memorandum Indenture covering the agreement made December 14, 1983 between [the Railroad] and the Pipelines. . . . There is, however, one item missing from the Memorandum which the Pipelines would like to cover with a separate unrecorded agreement. This item cover's [the Railroad's] right to ask the Pipelines to relocate at no cost to the Railroad, which is a condition that [the Pipeline] only finds acceptable with dealing with the Railroad."

A draft agreement attached to that memorandum provided: "Railroad shall have the right to full use and enjoyment of the said premises, except for the use herein-above set forth, provided that such use and enjoyment shall not unreasonably hinder, conflict, or

interfere with the exercise of the [Pipeline's] rights hereunder, and that no building, reservoir, structure improvement, obstructions, or impediment (including, but not limited to, paving, undercutting, or alteration of ground level) shall be constructed on the said right-of-way without Company's written consent."

3. *Trial Court Findings*

At the outset, the trial court identified the question presented: "The Railroad and the Pipeline seek a judicial declaration as to the duties of the parties under the AREA as they pertain to the purposes for which the Railroad may require the Pipeline, at the Pipeline's expense, to relocate its facilities on the Railroad's right of way, and which party must be for environmental remediation incidental to relocation."

The trial court accepted largely the Railroad's argument. The trial court concluded that "the term 'necessary' . . . means that the Railroad may require the Pipeline, at the Pipeline's expense, to relocate its facilities within the Railroad's right of way to another location within the Railroad's right of way whenever the Railroad believes it is in the Railroad's legitimate business interests. In addition, this Court concludes that the Pipeline must pay for environmental remediation costs and expenses incidental to relocation, except in those circumstances where the Railroad knows that the designated area of relocation requires environmental remediation."

In a 13-page statement of decision, the court made the following findings. The parties presented extrinsic evidence regarding (1) the circumstances of Pipeline relocations, and (2) statements made by representatives of the parties during contracting and relocations. Prior to 1988, most of the relocations were paid for by third parties. The remainder, which were for railroad purposes, were paid for by the Pipeline. After 1988, the Railroad paid for a few relocations under duress; the Pipeline paid for some; and third parties paid for others. "[N]either party was concerned if a third party paid for the relocations."

The relocation transactions do not support either party's position. No evidence suggested that when the AREA was drafted, the parties contemplated "that the costs to be

borne by the Pipeline when it relocated its facilities pursuant to a Railroad request should be anything but all inclusive, which would include environmental costs."

A memorandum dated September 22, 1986, from D.K. McNear to R.J. Hunt "support[s] the finding that prior to the execution of the AREA, the Pipeline was concerned with the terms of the Relocation Provision if it were to inure to the benefit of someone other than the Railroad . . . and that the AREA should be confined to circumstances exclusively related to those occasioned by railroad purposes." The Pipeline's proposed change to the Relocation Provision was not accepted by the Railroad.

The language of the AREA supports the Railroad's position. The contract also allows for the Railroad to assign its interest. Paragraph 1(f) of the AREA "reinforces the successor and assigns concept" and indicates that the parties were familiar with the Railroad as common carrier and did not include that description in the Relocation Provision.

At the time the Relocation Provision was first adopted, the Railroad and Pipeline were parent and subsidiary. "It is clear to this Court that when the language of the Relocation Provision was originally drafted, that it was the intent of the parties that the Railroad was granted the right to require the Pipeline to move at the Pipeline's expense (as between the parties, i.e. neither party was concerned if a third party paid for the relocations), and that this right was unlimited by the contract language." Beginning in 1983, the parties were not under common ownership and soon thereafter began disputing who was responsible for relocation costs. "[N]either the pre- or post-conflict evidence of the parties' positions taken regarding relocation transactions conveys a convincing pattern of practices which conclusively supports either the Pipeline's or the Railroad's interpretation of the term 'Necessary.'"

Judgment was entered April 17, 2007. The Pipeline appealed, seeking a reversal of the judgment "with instructions to enter judgment for the Pipeline."

DISCUSSION

We previously concluded that extrinsic evidence was relevant to interpret the Relocation Provision. "Whether the provision should be interpreted broadly to mean

necessary for any purpose (as the Railroad suggests) or more narrowly to be necessary only for a limited purpose (as the Pipeline requests) is a question of material fact." (*Union Pacific I*, *supra*, B160234.) The issue at trial was what the parties' intended the language of the Relocation Provision to mean. (See *Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979.) "'[T]he primary object of all interpretation is to ascertain and carry out the intention of the parties. [Citations.] All the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of the instrument.' [Citation.]" (*Burnett v. Piercy* (1906) 149 Cal. 178, 189; see also Civ. Code, §§ 1066, 1635 et seq.; Code Civ. Proc., § 1856 et seq.)

I. *Standard of Review*

"'Extrinsic evidence is "admissible to interpret the instrument, but not to give it a meaning to which it is not susceptible" [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, "[a]n appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation]." [Citations.]'" (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.) This court reviews a contract de novo if the extrinsic evidence is not in conflict even if conflicting inferences may be drawn from the evidence. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3.)

In contrast, "when . . . ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact . . . ." (*City of Hope National Medical Center v. Genentech, Inc*. (2008) 43 Cal.4th 375, 395; see also *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 914.) The trier of fact appropriately considers conflicting testimony about the meaning of contract provisions. "We apply the substantial evidence test only when conflicting evidence was introduced as to the

meaning of the contract term. In that instance, any reasonable construction of the contract will be upheld if it is supported by substantial evidence." (*Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552-1553.)

Here, the trial court considered conflicting evidence to interpret the Relocation Provision. The court weighed and analyzed the extrinsic evidence and interpreted the contract based both on the language of the contract and the extrinsic evidence. The trial court's conclusion was not based solely on the text of the parties' contract, contrary to one of the Pipeline's arguments. Also contrary to the Pipeline's argument, the parties presented conflicting evidence to support their conflicting interpretations of the Relocation Provision. The issue in dispute was the parties' intent and, on that issue, there was conflicting evidence, even if the course of performance evidence was undisputed (which we assume for purposes of this appeal). "[W]hen the meaning of a contract is uncertain, and contradictory evidence is introduced to aid in the interpretation, the question of meaning is one of fact properly assigned to the [finder of fact]." (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1111.) The proper standard of review is substantial evidence.

II. *Substantial Evidence Supports the Judgment*

We have described in detail the Railroad's argument in the trial court and the supporting evidence. The trial court found this evidence to be persuasive and the record contains substantial evidence in support of the judgment. In its opening brief, the Pipeline does not challenge the sufficiency of the evidence. In its reply brief, the Pipeline challenges the sufficiency of the evidence as part of its argument that the trial court applied the incorrect burden of proof, which is based on the following sentence in the statement of decision: "neither the pre- or post-conflict evidence of the parties' positions taken regarding relocation transactions conveys a *convincing* pattern of practices which *conclusively* supports either the Pipeline's or the Railroad's interpretation of the term 'Necessary.'" (Italics added.)

The Pipeline focuses on the italicized terms "convincing" and "conclusively" to contend that the court applied a "heightened evidentiary threshold to justify its refusal to

construe the term 'necessary' in light of the parties' course of performance." However, when read in context, the trial court's statement was that the evidence did not reveal a consistent pattern of business between the parties. The court was not discussing the standard of proof or quantum of proof. Instead, it was explaining its view of the probative nature of the evidence, an issue that was the crux of the parties' dispute.

There was no disagreement at trial regarding the burden of proof. The Railroad argued at trial that the preponderance of the evidence supported its position. The Pipeline argued that "Union Pacific could not possibly carry its burden of proving by a preponderance of evidence that the parties' practice accorded with its interpretation." There is no record support for the Pipeline's contention that the court applied a heightened burden of proof, its only challenge to the sufficiency of the evidence.

III. *The Pipeline Does Not Show the Course of Performance Evidence Was Dispositive*

Many of the Pipeline's arguments are based on its view that the contract should be reviewed de novo. The Pipeline's principal argument is that the undisputed course of performance evidence indicates that the Pipeline was required to pay for relocations only if the relocation was for a "railroad purpose." It further argues that the evidence was undisputed and overwhelmingly supported the Pipeline's interpretation of the Relocation Provision. That argument demonstrates only that one type of evidence bearing on the parties' intent supported the Pipeline's interpretation of the contract.

There is some force to the Pipeline's argument that course of performance evidence often is persuasive. "A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean." (*City of Hope National Medical Center v. Genentech, Inc*., *supra*, 43 Cal.4th at p. 393.) Course of performance evidence often constitutes strong evidence bearing on the parties' intent. (See, e.g., *Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 762; *City of Los Angeles v. Savage* (1958) 165 Cal.App.2d 1, 7; *Woodbine v. Van Horn* (1946) 29 Cal.2d 95, 104; *Beneficial etc. Ins. Co. v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 524.) Comment (g) to

section 202 of the Restatement of Contracts Second provides in part: "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such 'practical construction' is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings."

However, even though course of performance evidence may in many cases be persuasive, the pipeline identifies no authority holding that such evidence is dispositive. Its force in many cases does not make it strong in every case. Instead, the individual facts of each case must be considered when analyzing the parties' intent where a contract is susceptible to different interpretations. (*Grove v. Grove Valve & Regulator Co.* (1970) 4 Cal.App.3d 299, 309 [court may disregard parties' conduct in favor of better evidence]; cf. *Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 353 ["it is impossible to lay down an invariable and universal rule of construction [of deeds] . . . . Every transaction must be considered individually"].) Code of Civil procedure section 1856 allows course of performance evidence to explain or supplement a writing but does not mandate a court find such evidence persuasive.

The Pipeline incorrectly states in its posttrial brief that this court "squarely held such [course of performance] evidence to be highly probative and dispositive. . . ." The Pipeline incorrectly states in its opening brief that this court concluded the ambiguous term "should be determined, if possible, by reference to the parties' course of performance" or that this court held that the course of conduct was "the best evidence of the AREA's meaning." We previously held only that such evidence was relevant and raised a triable issue of fact sufficient to preclude summary adjudication. The trial court considered the evidence and found that it was not persuasive.

The Pipeline supports its argument that the trial court "had to use the course-of-performance evidence to" interpret the Relocation Provision with a lengthy discussion of the trial court's analysis of the California Supreme Court's opinion in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384 (*Dore*). That case was decided after *Union Pacific I*. In *Dore*, Justice Baxter, in a concurring opinion, joined by Justice Corrigan

suggested that *Pacific Gas*, the case upon which we heavily relied in *Union Pacific I*, may merit reconsideration. (*Dore*, at p. 395.) Justice Baxter worried that *Pacific Gas* created a parol evidence loophole (*Dore*, at p. 395), and the trial court noted that if it focused only on the language of the AREA, the language supported the Railroad's position.

The Pipeline contends that by describing the *Dore* opinion and Justice Baxter's dissent, the trial court incorrectly relied exclusively on a textual analysis of the agreement, in contravention of *Union Pacific I*. But, the trial court did not rely solely on a textual analysis; instead, it considered in detail all of the evidence presented by the parties. The Pipeline's statement that "[t]he trial court applied a purely textual analysis" ignores the court's extensive discussion of the extrinsic evidence provided by the parties as reflected in the above described statement of decision. That the court rejected the Pipeline's evidence as unpersuasive does not show the court failed to consider the evidence.

Clearly, the trial court did not credit the course of performance evidence as strongly as the Pipeline believes warranted. Still, the probative value of the evidence was a question for the trial court. (See *Grove v. Grove Valve & Regulator Co.*, *supra*, 4 Cal.App.3d at p. 309.) That the Pipeline finds the evidence relied on by the trial court to be "beside the point" and a "distraction" shows only that there was conflicting evidence and that the trial court weighed the evidence differently from the Pipeline.

IV. *The Pipeline Does Not Show That Admissions by the Railroad Were Dispositive*

The Pipeline also argues that the trial court should have relied on the Railroad's "admissions" regarding the parties' course of performance. The Pipeline believes these admissions conclusively show that "third parties, not the Pipeline, had to pay for relocations not in service of the Railroad's common carrier obligations."

Again, there is some force to the Pipeline's argument that employee's of the Railroad made damaging admissions. Benjamin Biaggini, the chairman and chief executive officer of the Railroad, testified that any third party requesting the Pipeline relocate was expected to pay for it. The trial court acknowledged that Biaggini's

testimony supported the Pipeline's interpretation. Paul Ferrell, in a letter he signed as manager of contracts for the Railroad, stated that the Railroad can relocate the pipeline for railroad purposes only. A separate e-mail reflects the same understanding.[1] In the statement of decision, the trial court stated, "The Court is also aware of the letters written by Mr. Farrell in 1997-2000 which state that the Railroad can cause the Pipeline to relocate only for railroad purposes. The timing (post execution of the AREA) and context of these letters has led this Court to conclude that they are of minimal value to a determination of the intent of the parties when they executed the AREA."

Although the Pipeline shows that there was evidence from Railroad employees that that supported its interpretation, the Pipeline does not show the trial court was required to credit heavily this evidence. The Pipeline's belief that the evidence carries "particularly strong weight" conflicts with the trial court's finding after the trial court expressly acknowledged the testimony. The trial court was not required to find the interpretation of Railroad employees dispositive. The trial court was tasked with interpreting the Relocation Provision and it was not required to follow the interpretation of any particular witness. Even with requests for admission, a trial court has discretion to "determine their scope and effect." (*Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 277; see also *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 360.)

V. *The Pipeline Does Not Show the Text of the Agreement Confirms Its Interpretation*

The Pipeline states that "[t]he trial court applied a purely textual analysis—the very one that this Court rejected on the first appeal—and held that the relocation right 'was unlimited by the contract language.'" Then based on that overarching premise, the Pipeline makes specific textual based arguments that (1) the court should have applied language in paragraph 1(f) of the AREA to the entire contract; (2) if the Railroad were

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[1] Ferrell explained this testimony in a subsequent deposition, but the trial court did not rely on his subsequent explanation.

the dominant party, the contract should have been construed against the Railroad; and (3) any ambiguity must be construed against the Railroad as grantor of the easement.

The Pipeline's overarching premise is incorrect. The trial court did not apply a purely textual analysis. To the contrary, as a result of the Pipeline's victory in the prior appeal, the trial court considered the extrinsic evidence admitted by the parties. The trial court credited the evidence presented by the Railroad.

Putting aside the overarching deficiency in the Pipeline's argument, none of the Pipeline's specific arguments demonstrates that the court erred in its analysis of the mutual intention of the parties. "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent acts and conduct of the parties." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 474.)

A.

Paragraph 1(f) of the AREA provides in part: "This grant is subject to and subordinate to the prior and continuing right and obligation of Railroad and its respective successors or assigns to use and maintain the entire railroad right of way and property in performance of its public duty as a common carrier. . . ." The trial court concluded that the failure to repeat this in the Relocation Provision suggested intent to exclude the limitation in the Relocation Provision.

The Pipeline argues that the trial court should have applied "railroad-purpose limitation on the Railroad's reserved rights in paragraph 1 of the contract as a tool for interpreting the rest of the AREA. Quoting Civil Code section 1641, the Pipeline states that paragraph 1(f) "help[s] to interpret' everything in the rest of the document." The Pipeline's statement, which was rejected by the trial court, is not persuasive.

Paragraph 1(f) does not concern the relocation of the Pipeline; it neither grants nor limits the relocation obligation. In addition, when the remainder of the provision is

considered, it allows the Railroad and its successors to construct, maintain, and operate "structures of any kind upon, along or across any or all parts of said land . . . all or any of which may be freely done at all time or times by Railroad, or its successors or assigns, without liability for compensation or damage." This broad language is inconsistent with the Pipeline's interpretation that the "duty as a common carrier" extends beyond the specific phrase in which it is contained.

B.

Additional facts are necessary to explain the Pipeline's argument that if the Railroad were the party with the greater bargaining position, the contract should be construed against it. The trial court found as follows: "At the time that the Relocation Provision was first adopted, the Railroad and Pipeline were parent/subsidiary. The easement granted to the Pipeline was the first significant lateral easement granted by the Railroad. The record reflects and logic would dictate that the Railroad was the dominant party in the Railroad/Pipeline relationship. It is clear to this Court that when the language of the Relocation Provision was originally drafted, that it was the intent of the parties that the Railroad was granted the right to require the Pipeline to move at the Pipeline's expense (as between the parties, i.e. neither party was concerned if a third party paid for the relocations), and that this right was unlimited by the contract language."

In our statement of facts in *Union Pacific I*, we indicated that the parties were sister subsidiaries based on the undisputed fact in the parties' separate statement that at the time the companies predecessors in interest entered the master agreements the parties were "sister subsidiaries." But during trial, the Pipeline's attorney represented that the Railroad was the "Pipeline's parent corporation."[2] In its closing argument, the Pipeline referred to the Railroad as the "parent" and itself as the "subsidiary." The Pipeline now argues that the trial court's conclusion "contradicts the prior findings in this case." The contradiction resulted from both parties' conflicting positions. The Pipeline does not show any error in the trial court's finding.

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[2] The Railroad's attorney represented that the Railroad created the Pipeline.

But even assuming some error in the characterization of the parties' past relationship, the Pipeline does not show that it matters. The only purported legal error identified by the Pipeline is one with no basis in the record; the Pipeline asks us to speculate that the Railroad "was either the drafter . . . or the one 'from whom the writing proceeds,' and the relocation provision should have been interpreted in favor of the Pipeline, not the Railroad."[3] The Pipeline cites to no evidence in support of its argument that the contract should be interpreted against the Railroad as drafter. Nor does the Pipeline support its statement that the court interpreted the contract in favor of the Railroad "simply because it is supposedly the 'dominant' party."

C.

The Pipeline concludes its opening brief with the following argument: "the relocation provision inures to the benefit of the Railroad as grantor, and thus must be construed against the Railroad in any close case." Civil Code section 1069 provides, "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such to a private party, is to be interpreted in favor of the grantor." The Pipeline argues that because the Railroad was the grantor of the easement the word "necessary" in the Relocation Provision should be construed against the Railroad.

The Pipeline does not further elucidate how this general rule applies to the Relocation Provision. But, assuming that it does, the single rule (which was never raised in the trial court) is a general rule; it does not exclude all the other rules of contract interpretation. (See *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448 [single rule of contract interpretation does not "operate to the exclusion of all other rules of contract interpretation"].) The parties' intent is the "ultimate interpretive touchstone." (*City of Manhattan Beach v. Superior Court*, *supra*, 13 Cal.4th at p. 243.)

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3 Civil Code section 1654 provides: "In cases of uncertainty not removed by the preceding rules [on contract interpretation], the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

In addition, there is no indication the trial court considered this case close. While it found there was evidence in support of the Pipeline's position, it found that some of the evidence was of "minimal value," and other evidence was not persuasive.[4]

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

BIGELOW, J.

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[4] We decline to consider the Pipeline's following argument raised for the first time on appeal: "Even if the Railroad once had an absolute relocation right based only on the text, its contrary behavior in the intervening decades precluded it from suddenly changing course." "The parties' course of performance redefined the term in a way that the Railroad could not unilaterally take back." The Pipeline provides no reason why it is proper to raise in the first instance in this court. (See *El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004) 122 Cal.App.4th 1341, 1351.)